

# Department of Marine Resources

## NOTICE OF AGENCY RULE-MAKING PROPOSAL

**RULE TITLE:** Chapter 2.95 Water Quality Classifications and Shellfish Aquaculture;  
Chapter 2.90(3)(C)(3) LPA - shellfish less than 25mm in size - citation correction; and  
Chapter 22 SHELLFISH CULTURE IN CLOSED AREAS

**CONCISE SUMMARY:** The Department of Marine Resources proposes to move an updated version of Chapter 22 into Chapter 2. The proposed amendments would replace and update Chapter 22 "Shellfish Culture in Closed Areas" with Chapter 2.95 "Water Quality Classifications and Shellfish Aquaculture", which would be compliant with the National Shellfish Sanitation Program (Model Ordinance), Chapter VI Shellfish Aquaculture.

**STATUTORY AUTHORITY:** 12 M.R.S.A. §6072 and §6856(4)

### **PUBLIC HEARINGS\*:**

Monday, March 10, 2008, 6:00 pm, Lincoln County Communication Center, Meeting Room (lower entrance behind the courthouse), Route 1, Wiscasset;

Tuesday, March 11, 2008, 6:00 pm, City Hall Auditorium, One City Hall Plaza, Ellsworth; and

Thursday, March 13, 2008, 6:00 pm, State Ferry Terminal (Conf. Rm), 517A Main St., Rockland

*\*Public hearings for 3 separate rulemakings will be held each night with each hearing to start immediately upon the conclusion of the previous hearing. The order will be Chapter 2.95 and Chapter 22 Water Quality Classifications and Shellfish Aquaculture, etc. (this notice), next Chapter 21 Relay, then Chapter 2 LPA's and Municipalities and technical changes. See separate rulemaking notices for rules not listed in this notice. Electronic copies with the proposed text may be obtained from the web site listed below; copies will be available at the hearings; or to request hard copies to be mailed please use the contact information listed.*

**DEADLINE FOR COMMENTS:** March 31, 2008

**AGENCY CONTACT PERSON:** Amy Fitzpatrick (tel: 207-633-9554) and  
Samantha Horn Olsen (tel: 207-624-6554)

**Maine Written Comments to:** Department of Marine Resources, attn L Churchill  
**ADDRESS:** PO Box 8, West Boothbay Harbor, Maine 04575-0008

**WEB SITE:** <http://www.maine.gov/dmr/rulemaking/>

**FAX:** (207) 633-9579; **TTY:** (207) 633-9500 (Deaf/Hard of Hearing) **Hearing facilities:** If you require accommodations due to disability, please contact Amanda Beckwith, at (207) 287-7578.

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### **Additional information:**

The Department of Marine Resources proposes to move an updated version of Chapter 22 into Chapter 2. The proposed amendments would replace and update Chapter 22 "Shellfish Culture in Closed Areas" with Chapter 2.95 "Water Quality Classifications and Shellfish Aquaculture", which would be compliant with the National Shellfish Sanitation Program (Model Ordinance), Chapter VI Shellfish Aquaculture. The proposed regulations would impact those persons who hold or apply for an aquaculture lease or LPA license from the Department of Marine Resources.

Relevant sections of the MO Chapter VI are summarized below.

Web links: DMR Chapters 2 and 22 are located at <http://www.maine.gov/sos/cec/rules/13/chaps13.htm>

FDA, NSSP, Chapter VI Shellfish Aquaculture is located at: <http://www.cfsan.fda.gov/~ear/nss2or06.html>

*Excerpts from the National Shellfish Sanitation Program (Model Ordinance), Chapter VI Shellfish Aquaculture:*

.02 General

- E. Water quality at any site used for open water or land based aquaculture shall meet the criteria for the approved, conditionally approved, restricted or conditionally restricted classification.
- F. Shellfish cultured in any open water or land based system meeting the criteria for the approved classification of a growing area throughout the culture period may be immediately marketed.
- G. Any shellfish raised in aquaculture shall be subjected to relaying or depuration prior to direct marketing if the culture area or facility is located in or using water which is in:
  - (1) The closed status of the conditionally approved classification;
  - (2) The restricted classification; or
  - (3) The open status of the conditionally restricted classification.
- I. Harvesting, processing, storage, and shipping requirements for shellfish raised in aquaculture shall be the same as the requirements for wild shellfish specified in Chapters V, VII, VIII, IX, X, XI, XII, XIII and XIV.
- J. Complete and accurate records shall be maintained for at least two (2) years by the aquaculturist and shall include the:

- (1) Source of shellfish, including seed if the seed is from growing areas which are not in the approved classification;
- (2) Dates of transplanting and harvest; and
- (3) Water source, its treatment method, if necessary, and its quality in land based systems.

**.03 Seed Shellstock**

Seed may come from any growing area, or from any growing area in any classification, provided that:

- (1) The source of the seed is sanctioned by the Authority.
- (2) Seed from growing areas or growing areas in the restricted or prohibited classification have acceptable levels of poisonous or deleterious substances; and
- (3) Seed from growing areas or growing areas in the prohibited classification are cultured for a minimum of 6 months.

**Proposed rulemaking – see underlined or ~~deleted~~ text below:**

**Chapter 2 - Aquaculture Lease Regulations**

**2.95. Water Quality Classifications and Shellfish Aquaculture**

**A. Compliance**

1. Applicability: This section applies to those persons who are issued an aquaculture lease pursuant to 12 M.R.S.A. §6072, §6072-A, or 6072-B, or a limited-purpose aquaculture (LPA) license pursuant to 12 M.R.S.A. §6072-C
2. Water Quality: Water quality at any site used for aquaculture shall meet the criteria for the approved, conditionally approved, restricted or conditionally restricted classification, except for the culture of seed, as described in Chapter 2.90(3)(C)(3) and 2.95(A)(4).

Any shellfish harvested pursuant to an aquaculture lease, LPA, or permitted site, shall be subjected to relaying or depuration prior to direct marketing if the culture area or facility is located in or using water which is in:

- (a) The closed status of the conditionally approved classification;
- (b) The restricted classification; or
- (c) The open status of the conditionally restricted classification.

Relaying of shellfish requires a permit pursuant to DMR Regulations Chapter 21 Relay of Shellfish.

Depuration of shellfish requires a permit pursuant to DMR Regulations Chapter 20 Depuration.

3. Closed Area compliance: Direct market harvest of shellstock is prohibited in areas that are closed due to marine biotoxins pursuant to Chapter 96 and bacterial pollution pursuant to Chapter 95, and in those areas that may be closed by the Department. For details about closure lines contact Marine Patrol Division I, west of Port Clyde, Tel. (207) 633-9595 or Marine Patrol Division II, east of Port Clyde, Tel. (207) 667-3373, or telephone the Shellfish Sanitation Hotline at 1-800-232-4733 or on the web at: <http://www.maine.gov/dmr/shellfish%20sanitation%20hot%20line.htm>.
4. Seed Shellstock source: Seed that comes from an approved hatchery will not require a permit, except for any applicable permits for importation or introduction. Seed that comes from any growing area in the approved classification or the conditionally approved classification in the open status will not require a permit. Seed that comes from growing areas in any other classification will require a permit. A permit may be issued by the department provided that:
  - (a) The movement of the seed is approved by the Commissioner if it is from a growing area in other than the approved or conditionally approved classification. Applications may be requested to be mailed by writing the Department of Marine Resources, attn: Public Health Division, 21 State House Station, Augusta, Maine 04333-0021 or may be printed from the Department's web site: <http://www.maine.gov/dmr/crd/forms/shellfish%20import%20application%202004.pdf>;
  - (b) Seed from growing areas in the restricted or prohibited classification have poisonous or deleterious substances that are at or below acceptable levels.
  - (c) Seed from growing areas in the prohibited classification are cultured for a minimum of 6 months.

- (d) Seed for LPAs must meet the requirements of the Health Areas in Chapter 2.90(3)(B)(3) and 2.05(10).  
(d) Inspection: The Commissioner and his/her agents shall inspect the lease site, seed, operations, and business records of seed permit holders.

## B. Definitions

In addition to the definitions set forth in 12 M.R.S.A. §6001, Chapters 2.05 and 15.02, the following definitions shall apply in interpretation of this chapter.

1. "Approved" means a classification used to identify a growing area where harvest for direct marketing is allowed by the Department.
2. "Classification of Growing Areas" means that the growing area has been subjected to a sanitary survey and shall be correctly classified based on the twelve year sanitary survey, and its most recent triennial or annual reevaluation when available, as any one or combination of the following:
  - (a) Approved;
  - (b) Conditionally approved;
  - (c) Restricted;
  - (d) Conditionally Restricted; or
  - (e) Prohibited.

Growing areas not subjected to a sanitary survey every twelve years shall be classified as prohibited.  
Growing areas which do not have a completed written triennial reevaluation report shall be placed in the closed status immediately.
3. "Closed Status" means any classified growing area closed for a limited or temporary period because of:
  - (a) An emergency condition or situation;
  - (b) The presence of biotoxins in concentrations of public health significance;
  - (c) Conditions stipulated in the management plan of conditionally approved or conditionally restricted areas; or
  - (d) Failure of the DMR to complete a written sanitary survey or triennial review reevaluation report.
4. "Conditionally approved" means a classification used to identify a growing area which meets the criteria for the approved classification, only under certain conditions described in a management plan. See Ch. 15.02(A)(16).
5. "Conditionally restricted" means a classification used to identify a growing area which meets the criteria for the restricted classification, only under certain conditions described in a management plan. See Ch. 15.02(A)(17).
6. "Growing area" means any site which supports or could support the propagation of shellstock by natural or artificial means. See Ch. 15.02(A)(36).
7. "Open Status" means, except for an area in the prohibited classification, any correctly classified growing area that is normally open for the purposes of harvesting shellstock, subject to the limitations of its classification.
8. "Reopened Status": a growing area temporarily placed in the closed status shall be returned to the open status only when:
  - (a) The emergency situation or condition has returned to normal and sufficient time has elapsed to allow the shellstock to reduce pathogens or poisonous or deleterious substances that may be present in the shellstock to acceptable levels. Studies establishing sufficient elapsed time shall document the interval necessary for reduction of contaminant levels in the shellstock to pre-closure levels. In addressing pathogen concerns, the study may establish criteria for reopening based on coliform levels in the water;  
or
  - (b) The requirements for biotoxins or conditional area management plans as established in the Department's Biotoxin Contingency Plan or Conditional Area Management Plans, respectively, are met; and
  - (c) Supporting information is documented by a written record in the central file.
9. "Restricted" means a classification used to identify a growing area where harvesting shall be by special license and the shellstock, following harvest, is subjected to a suitable and effective treatment process

through relaying or depuration. See Ch. 15.02(A)(75). (The term "special license" in this chapter section does not refer to licenses issued pursuant to 12 MRSA §6074.)

10. "Seed" means any juvenile shellstock that meet one of the following criteria:

- (a) Which are obtained from hatcheries.
  - (b) Which do not exceed 10 percent of the market weight.
  - (c) Which are 6 months or more growing time from market size.
- Note: Seed mussels are defined separately in Chapter 12.03(B).

11. "Shellfish" means all species of:

- (a) Clams, mussels, quahogs and oysters, whether:
  - (1) Shucked or in the shell;
  - (2) Fresh or frozen; and
  - (3) Whole or in part.
- (b) Scallops in any form, except when the final product form is the adductor muscle only.  
See Ch. 15.02(A)(81)

12. "Shellstock" means live molluscan shellfish in the shell; and shellfish which have not been removed from their shells (12 MRSA §6001(42) and Ch. 15.02(A)(82)).

13. "Status of Growing Area" means that the status of a growing area is separate and distinct from its classification and may be open, closed or inactive for the harvesting of shellstock.

2.90 Limited-purpose aquaculture (LPA) license

3. Site Limitations

C. DMR Water Quality Program Closure Areas

- (2) LPA license sites may only be located in areas that are classified as approved, conditionally approved, restricted, or conditionally restricted, pursuant to DMR regulations Chapters 95 and 96.
- (3) Exemption for shellfish less than 25mm in size.

An LPA license site that rears or contains only shellfish 25mm or less in size may be located within prohibited areas pursuant to DMR regulations Chapter 2.95(1)(A)(4)22. All movement of cultured shellfish from a license site under this exemption must be conducted pursuant to DMR regulations in Chapter 2.95 and 2122, which govern the relaying or movement of shellfish from these areas to areas suitable for harvesting.

## ~~Chapter 22 – Shellfish Culture in Closed Areas~~

### ~~SUMMARY:~~

~~These regulations describe the procedures governing the culture of shellfish in closed areas and the harvesting of shellfish in closed areas for relaying to open areas. They are a consolidation of existing Department regulations, Chapters 21 and 22, and are promulgated pursuant to 12 M.R.S.A. §6856(4)(D) and the Maine Administrative Act, 5-M.R.S.A. §9051 et seq.~~

### ~~22.01 Purpose~~

~~Harvesting of shellfish in closed areas generally is governed by 12 M.R.S.A. §6856, Subsection (4)(D) that allows the Commissioner of the Department of Marine Resources to adopt regulations concerning the methods of taking, handling, shipping, transporting and processing of shellfish taken from closed areas. These regulations govern the conduct of shellfish culture activities in closed areas and the transfer of shellfish from closed areas for the purpose of relaying to open areas. These regulations are designed to accommodate the particular operational requirements of persons engaged in the aquaculture industry and to maximize the use of the state's shellfish resources while protecting the public health. All culture of shellfish in closed areas and relaying of shellfish from closed areas to open areas must be conducted in accordance with these regulations.~~

### ~~22.02 Definitions~~

- ~~A. Aquaculture. "Aquaculture" means the culture or husbandry of marine organisms by any person in an area leased under the provisions of 12 M.R.S.A. §6072.~~
- ~~B. Authorized Area. "Authorized Area" means any area designated by the holder of the permit under this chapter and approved by the Commissioner to receive shellfish taken and shipped or transported from a closed area pursuant to the terms of this chapter.~~
- ~~C. Closed Area. "Closed Area" means any area closed for the taking of shellfish because of pollution or contamination pursuant to the provisions of 12 M.R.S.A. §6172.~~

- D. ~~Commissioner. "Commissioner" means the Commissioner or the Deputy Commissioner of the Department of Marine Resources.~~
- E. ~~Culture. "Culture" means to take, handle, possess, ship or transport shellfish for any purpose except for depuration purposes as authorized by 12 M.R.S.A. §6856(3).~~
- F. ~~Moderately Polluted Area. "Moderately Polluted Area" means an area where the water quality does not exceed 700 total coliforms/100 milliliters of water.~~
- G. ~~Open Area. "Open Area" means any area open to the taking of shellfish pursuant to 12 M.R.S.A. §6172.~~
- H. ~~Relaying. "Relaying" means the transfer of shellfish from an aquaculture lease site within a moderately polluted area to an open area approved by the Commissioner for the self-cleansing of shellfish.~~
- I. ~~Shellfish. "Shellfish" means all edible species of oysters, softshell clams, quahogs or mussels.~~

#### ~~22.03 Permit Required~~

- A. ~~It shall be unlawful for any person other than a person holding an aquaculture lease under 12 M.R.S.A. §6072 to culture shellfish taken from a closed area without a permit issued by the Commissioner.~~
- B. ~~It shall be unlawful for any person holding an aquaculture lease issued under 12 M.R.S.A. §6072 to take up shellfish from the lease area in a closed area and to relay that shellfish without a permit issued by the Commissioner.~~

#### ~~22.04 Activity Authorized by These Regulations~~

- A. ~~The holder of a permit to culture shellfish taken from a closed area may culture shellfish within an authorized area or in a closed area, or ship or transport shellfish from a closed area to an authorized area to a closed area or ship or transport shellfish between authorized areas, as the Commissioner may allow.~~
- B. ~~The holder of a permit to relay shellfish from a closed area to an open area may harvest shellfish from a closed area and relay them.~~

#### ~~22.05 Application for Permit~~

- A. ~~A person shall apply in writing to the Commissioner prior to commencing any of the activities described in Section 22.04 of these regulations.~~
- B. ~~The application shall include the name and address of the applicant, a chart or geographical description of the location(s) of the authorized area, lease area, closed area, and open area in which either culture or relaying is to take place; a brief description of the culture or relaying activities to be taken in these areas; the date and duration of these activities; the species and estimated quantities of the shellfish involved; and the name or names of the persons responsible for compliance with these regulations and the terms of any permits issued under this section.~~

#### ~~22.06 Issuance of Permits~~

~~The Commissioner may issue a permit to allow the culture of shellfish in closed areas and/or harvesting in closed areas for relaying to open areas if he determines that the proposed activities pose no threat to the public health and safety. The permit will designate one or more persons as responsible for compliance with these regulations and the terms of the permit during actual culture or relaying operations. The permit may be conditioned on compliance with operational and procedural requirements relating to preservation of the public health and safety.~~

#### ~~22.07 Culture in Closed Areas~~

- A. ~~The holder of a permit to culture shellfish in a closed area shall notify the Marine Patrol Officer assigned to the holder's area twenty four (24) hours prior to the taking of shellfish from a closed area and relocation of those shellfish into an authorized area or the shipment or transport of shellfish between authorized areas.~~
- B. ~~Notice shall include a description and location of the closed area and location of the authorized area(s); the date and time of harvesting, shipment or transport will take place; the method of shipment or transport; and the name(s) of the persons responsible for compliance with the terms of the permit during these activities.~~
- C. ~~The holder of a permit may ship or transport shellfish between a closed area and an authorized area or between authorized areas without prior notice when there is an immediate and serious threat of injury or destruction to the shellfish because of actions or events beyond the control of the permit holder.~~
- D. ~~At the earliest practicable time after activities described in Section 22.08(C) and within two hours after shipment or transport is complete, the holder of a permit shall notify the Marine Patrol Officer assigned to the holder's area of the shipment or transport.~~

#### ~~22.08 Relaying of Shellfish~~

- A. ~~Prior to the issuance of the permit, the Commissioner shall determine the bacterial level of the shellfish to be taken from the closed area and the quality of the water in the open area into which the shellfish will be relayed.~~
- B. ~~Waters in an open area in which shellfish have been relayed must have an average daily temperature over 50°F. Relayed shellfish shall remain in the open area at temperatures over 50°F for a period of not less than 14 days from the time the last shellfish are relayed.~~
- C. ~~No shellfish shall be relayed into an open area within 500' of any other open area in which shellfish are being taken by commercial shellfish harvesters.~~
- D. ~~No relayed shellfish shall be removed from an open area without the prior written consent of the Commissioner after testing by the Department indicates that the shellfish are sufficiently free from polluting bacteria to allow wholesale or retail sale without further cleansing.~~
- E. ~~The Commissioner retains the right to monitor and regulate all phases of the relaying operation.~~

~~F. The holder of the permit must maintain a permanent record of all activities conducted under a relaying permit and make those records available to the Commissioner on request.~~

~~22.09 Duties of the Person Responsible for Compliance~~

~~A. The permit holder or the person designated by the permit holder and named in the permit as responsible for compliance with these regulations and the terms of the permit shall oversee each member of the crew engaged in culture and relay operations and ensure compliance.~~

~~B. The Commissioner may revoke the permit granted under this section in the event these regulations and/or the terms of the permit or the shellfish laws are violated by the holder of the permit, the person responsible for compliance or crew members working under their direction.~~

~~22.10 Expiration of Permits~~

~~A permit issued under this chapter shall expire on December 31 of the year in which it is issued.~~

~~22.11 Renewal~~

~~The Commissioner may renew a permit when the holder of the permit requests renewal prior to expiration and the applicant demonstrates compliance with these regulations and the terms of the existing permit.~~

~~22.12 Inspection~~

~~The Commissioner and his agents may inspect and observe the activities of all persons operating under the provisions of these regulations.~~

~~22.13 Violation~~

~~Violation of these regulations and/or the terms or conditions of any permit shall be a Class D. crime (12 M.R.S.A. §6204) and may be grounds for the suspension of any licenses or certificates issued under the marine resources laws (12 M.R.S.A. §6351).~~